IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

MICHELLE LYNN W.,

Plaintiff,

v. Civil Action No. 5:20-CV-0631 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES: OF COUNSEL:

FOR PLAINTIFF

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NICOLE SONIA, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. § 405(g) are cross-motions for judgment on the pleadings.[1] Oral argument was conducted in connection with those motions on August 3, 2021, during a telephone conference held on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination did not result from the application of proper legal principles and is not supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, a transcript of which is attached and incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Plaintiff's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Social Security Act, is VACATED.

3) The matter is hereby REMANDED to the Commissioner, without a directed finding of disability, for further proceedings consistent with this determination.

4) The clerk is respectfully directed to enter judgment, based upon this determination, remanding the matter to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and closing this case.

David E. Peebles
U.S. Magistrate Judge

Dated: August 5, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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MICHELLE LYNN W.,

Plaintiff,

vs. 5:20-CV-631

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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Transcript of a **Decision** held during a Telephone Conference on August 3, 2021, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: Let me begin by thanking both of you for excellent oral and written presentations.

I have before me a challenge by plaintiff to an adverse determination by the Commissioner of Social Security finding that she was not disabled at the relevant times and therefore ineligible for the benefits sought. The challenge is brought pursuant to 42 United States Code Section 405(g).

The background is as follows: Plaintiff was born in September of 1971 and is currently 49 years of age. She stands approximately five foot three-and-a-half inches in height and at various times has weighed between 195 and 220 pounds. Plaintiff has a 12th grade education and was in regular classes while in high school. She also has one-and-a-half years of community college education in the field of liberal arts. Plaintiff lives with her husband and one son who in April of 2019 was 23 years old. She has three other grown children. Plaintiff lives in a house in Hannibal, New York. She at one point moved to North Carolina but then returned to New York. She is right-handed and drives. Plaintiff stopped working in April of 2012. She suffered a Workers' Compensation injury when she slipped on water and fell in October of 2011. She worked up until January 7, 2012. She later returned to work on April 9 and

left on April 27, 2012. She worked from 1990 until she stopped working as a licensed CNA.

Plaintiff suffers physically from asthma, lumbar degenerative disk disease, heart issues, type 2 diabetes, and obesity. She underwent a laminectomy with fusion on December 20, 2013. The surgery was performed by Dr. Colin Harris, who practices with Syracuse Orthopedic Specialists, or SOS. Mentally, plaintiff also suffers from depressive disorder and anxiety disorder. Plaintiff's primary health care provider is through Fulton Health Center which apparently is now known as ConnextCare. She has also treated with SOS, including Dr. Harris and Dr. Richard DiStefano. She has seen Dr. Raymond Alcuri from 2011 until June of 2013 for back pain management. She has seen providers at New York Spine & Wellness Center. She has seen Physician's Assistant Craig Hanifin and she has treated at the New York Heart Center.

She has been prescribed various medications including hydrocodone, ibuprofen, nitroglycerin, metformin, meloxicam, tizanidine, epidural steroid injections, and a rescue inhaler. She has also undergone massage therapy and chiropractic intervention.

In terms of activities of daily living, plaintiff is able to dress, bathe, groom, at least above the waist. She does laundry, she's able to shop, does some cooking, she

is able to drive short distances, she watches television, listens to the radio, and socializes. Plaintiff is a smoker, between one half and one pack per day. At one point she quit but then resumed smoking.

Procedurally, plaintiff applied for Title II Disability Insurance benefits on August 20, 2013, alleging an onset date of April 27, 2012. It was noted that a prior application from November 12, 2012 was reopened as well. Plaintiff claims disability based on heart condition, depression, diabetes, spinal stenosis, a blood disorder, and high blood pressure. On February 5, 2015, Administrative Law Judge Bruce Fein conducted a hearing to address plaintiff's application for benefits. Judge Fein subsequently issued an adverse determination on July 10, 2015. That became a final determination of the agency on October 17, 2016, when the Social Security Administration Appeals Council denied plaintiff's application for review.

Upon court review, the matter was remanded based on a decision from Magistrate Judge Thérèse Wiley Dancks issued on January 24, 2018 for failure of the administrative law judge to address treatment notes, including from Dr. Harris, Physician's Assistant Richman, Dr. Tiso, and Dr. Tallarico, pursuant to the treating source rule, all suggesting that plaintiff was capable of either sedentary or less than sedentary work. The administrative law judge decision was

subsequently vacated on May 21, 2018 by the Appeals Council and the matter was remanded.

A new hearing was conducted on April 9, 2019 by ALJ Fein, at which a vocational expert also testified. At that hearing, it was determined that plaintiff was seeking disability benefits for a closed period of April 27, 2012 to July 1, 2017, based upon her return to work on that date. ALJ Fein issued an adverse determination again on May 22, 2019. That became the final determination when the Appeals Council denied plaintiff's application for review on May 8, 2020. This action was commenced on June 8, 2020 and is timely.

In his decision, ALJ Fein applied the familiar five-step sequential test for determining disability after first concluding that plaintiff was insured through December 13, 2018.

At step one, he concluded plaintiff had not engaged in substantial gainful activity over the closed period for which benefits were sought. He did, however, note that there was some work activity in 2016, but it did not rise to a level sufficient to be found to be substantial gainful activity.

At step two, ALJ Fein concluded that plaintiff does suffer from severe impairments that impose more than minimal limitations on her ability to perform basic work functions,

including lumbar degenerative disk disease status post laminectomy and fusion, coronary artery disease status post myocardial infarction, depressive disorder, and anxiety disorder.

At step three, he concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions set forth in the regulations, including Listings 1.04, 4.04, 12.04, and 12.06.

After reviewing the medical evidence and other evidence, plaintiff's residual functional capacity was determined by ALJ Fein to include the ability to perform sedentary work with exceptions including: She could not climb ropes, ladders, or scaffolds, kneel, crouch, or crawl. The claimant could occasionally balance, stoop, and climb ramps or stairs, she had to avoid concentrated exposure to unprotected heights, she also needed a low stress job which is defined as one involving only occasional decision making, changes in the work setting, and use of judgment.

At step four, ALJ Fein concluded that plaintiff is not capable of performing her past relevant work as a home health aide or CNA, either as actually performed or generally performed in the national economy.

At step five, ALJ Fein first noted that if plaintiff were capable of performing a full range of sedentary work, a finding of no disability would be required

under the Medical-Vocational Guidelines, or the Grid Rules, and specifically Grid Rules 201.28 and 201.21. Noting that there were additional limitations that would erode the job base on which the Grids were predicated, ALJ Fein concluded, based on the testimony of a vocational expert who applied a hypothetical that aligned with the RFC finding, plaintiff is capable of performing available work in the national economy, citing representative positions of table worker, stuffer-toy and addresser, and therefore concluded that plaintiff was not disabled at the relevant times.

The court's function in this matter is to determine whether correct legal principles were applied and whether the result is supported by substantial evidence. The Second Circuit noted in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443, Second Circuit, 2012, that substantial evidence means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. The court further noted in *Brault* that this is an extremely deferential standard and stringent, more so even than the clearly erroneous standard. The court further noted that, under the substantial evidence standard, once an ALJ finds a fact, that fact can be rejected only if a reasonable fact finder would have to conclude otherwise.

In this case, plaintiff raises a single contention and that revolves around the determination, how much weight

to be given to medical opinions in the record and it centers not exclusively but primarily on the treating source rule as it applies to opinions given by Dr. Harris, the treating orthopedic surgeon. And it is based on treatment notes from October 2015 and February 2016 as well as the July 2015 medical source statement and limitations cited in lifting and carrying as well as twisting and being off-task and absent.

As the plaintiff points out, under the regulations that were in effect at the time this application was made, the opinion of a treating physician regarding the nature and severity of an impairment is ordinarily entitled to considerable deference provided that it is supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence. *Veino v. Barnhart*, 312 F.3d 578 at 588. Treating source opinions are not controlling, however, if they are contrary to other substantial evidence in the record, including the opinions of other medical experts. And of course where conflicts arise in the form of contradictory medical evidence, the resolution is properly entrusted to the Commissioner under *Veino*, 312 F.3d at 588.

Significantly, when an ALJ does not give controlling weight to a treating source's opinion, he or she must apply several factors to determine what degree of weight should be assigned to the opinion. Those factors are set out

in 20 C.F.R. Section 404.1527, and in this circuit are generally referred to as the *Burgess* factors. When a treating source's opinion is repudiated, an ALJ must provide specific reasons for the rejection. The Circuit has noted that in many instances because of the sheer volume I'm sure, among other things, of cases that ALJs experience, they don't often recite verbatim or rotely the *Burgess* factors that are considered when analyzing a treating source's opinion. And so in *Estrella v. Berryhill*, for example, 925 F.3d 90, Second Circuit 2019, the Second Circuit noted that rote recitation of the *Burgess* factors is not necessarily required so long as a searching review of the record reflects that the treating source rule was not violated.

I have to say that in this case, it is somewhat disappointing that ALJ Fein did not more clearly articulate why Dr. Harris' opinions, which were contrary to the residual functional capacity finding, were not given controlling weight, particularly since this case was once remanded for that very reason by the court.

Focusing on the July 2015 medical source statement at page 822, it is rejected based on a very short paragraph and really a single statement that many of plaintiff's physical exams have noted relatively normal findings and there are citations to treatment records. On the issue of lifting there are clearly competing medical opinions and

under *Veino*, of course, it is for the ALJ to resolve those inconsistencies.

My focus really is on the issue of twisting. Chiropractor Sean Higgins on July 24, 2012 at pages 402 to 405 issued an opinion finding that plaintiff should not engage in repetitive twisting from the waist. Of course that opinion was given prior to the date of plaintiff's surgery.

Dr. Colin Harris, a treating source, has issued two separate opinions addressing twisting. In the July 28, 2015 medical source statement at 733 to 735, it was indicated that plaintiff should rarely twist. On October 20, 2015 at page 1076, Dr. Harris prescribed limited twisting activity.

Physician's Assistant Craig Hanifin and Dr. Warren Wulff on February 23, 2016 at page 1066 indicated that plaintiff should engage in limited twisting activity.

Dr. Elke Lorensen, whose opinion was given some weight, issued a consultative opinion on 425 to 430 based on her examination of the plaintiff. It does not contain any mention one way or the other of twisting limitation.

Dr. Steven Shilling was issued interrogatories, he's a cardiology specialist, at 1027 to 1043. His responses dodge any questions related to plaintiff's back condition.

Dr. Sonya Clark, an orthopedic surgeon who was also posed interrogatories, issued responses on August 31, 19 -- 2018, I'm sorry, at pages 1016 to 1021. The administrative

law judge and defendant rely heavily on that statement. However, Dr. Clark in the form is not asked any questions concerning twisting. The postural limitations that were asked about include climb stairs and ramps, climb ladders or scaffolds, balance, stoop, kneel, crouch, or crawl. No request about the ability to twist.

In his decision, ALJ Fein does not specifically discuss twisting. He does discount Dr. Harris and PA Hanifin's statements generally as not supported at 822.

When you look at the *Burgess* factors, Dr. Harris is an orthopedic surgeon, longstanding treatment relationship. The administrative law judge really did a very limited review of the records and gave no explanation as to why the multiple opinions limiting twisting were discounted.

This is a close case because I understand the deferential nature of the court's review in this case, but I believe that in this instance the treating source rule was violated, particularly when it comes to the opinions regarding twisting. The question really then becomes, was it harmless error. This is a case that was resolved at step five where the Commissioner bears the burden of proof. Clearly the Commissioner can carry the burden by posing a hypothetical to the vocational expert that includes all of the limitations that the plaintiff experiences. *Calabrese v. Astrue*, 358 F.App'x 274 from Second Circuit 2009. In this

case when it comes to twisting, there is no guidance in Social Security Rulings or Regulations, including SSR 85-15, concerning twisting. The Dictionary of Occupational Titles also contains no guidance on the issue, as well as the Selected Characteristics of Occupations. *Ricketts v. Berryhill*, 2017 WL 6624025, from the Western District of Oklahoma, December 28, 2017.

The crux then is that the vocational expert really needs to weigh in on the effect, if any, on a twisting limitation and in this case, I could perhaps imagine that the three jobs cited would not necessarily involve more than occasional twisting, but I'm not a vocational expert. It's not my place to make that judgment, it's for the vocational expert; and the Commissioner, again, bears the burden of proof at step five. So I believe that a remand is required in order to probe this issue. *Hopkins v. Commissioner of Social Security*, 2015 WL 4508630 from the Northern District of New York 2015. I find error and therefore no need to address the secondary issues of off-task and absence. I don't find persuasive evidence of disability, and so I will grant judgment on the pleadings to the plaintiff, vacate the Commissioner's determination, and order that the matter be remanded for further consideration consistent with this opinion.

Thank you both for excellent presentations, I hope

you stay safe in these interesting times.

MR. FAIR: Thank you, your Honor.

MS. SONIA: Thank you.

(Proceedings Adjourned, 11:45 a.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of August, 2021.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter